No. 91-1833

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1833

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

In our petition for a writ of certiorari, we demonstrate that the court of appeals has interpreted the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and congressional appropriations acts to impose on federal agencies substantial burdens that do not follow from the text of those statutes. Specifically, the court of appeals has elevated statements made in congressional committee reports to the level of an Act of Congress by holding that such statements provide "law to apply" sufficient to permit judicial review of an agency's allocation of lump-sum appropriations. Respondents do not deny that this ruling squarely conflicts with the District of Columbia Circuit's decision in *International Union* v. *Donovan*, 746 F.2d 855 (1984), cert. denied, 474 U.S. 825 (1985). In addition, the court of appeals has seriously misinterpreted the

rulemaking provisions of the APA by deeming an agency's discretionary resource-allocation decision to be a legislative "rule." Respondents' attempts to justify the court of appeals' reasoning and to downplay the significance of its decision are unpersuasive.

1. a. Respondents err in contending (Br. in Opp. 5-6) that the first question presented in our petition (Pet. i, 9-15)—the validity of the court of appeals' finding of "law to apply" for purposes of reviewing the decision of the Indian Health Service (IHS) to terminate the Indian Children's Project (ICP)—is not ripe for consideration by this Court because the courts below have not yet gone on to hold that the termination was arbitrary and capricious on the merits. The court of appeals' finding of "law to apply," if allowed to stand, would result in direct and tangible interference with the decisionmaking processes of the affected agencies, not only in further proceedings concerning the ICP, but in all aspects of the federal government's provision of services to Indians. Virtually all agency decisions with any potential impact on Indians would have to be carefully and exhaustively documented in anticipation of potential judicial review on the merits, despite the total absence of judicially manageable standards for conducting such review. The court's holding therefore imposes an immediate burden on the affected agencies, even before the courts below turn to the question whether petitioners' decision in this particular case was arbitrary or capricious.

b. Respondents also err in contending (Br. in Opp. 5-6) that certiorari should be denied because petitioners did not appeal from the district court's ruling that the termination of the ICP violated the publication requirements of 5 U.S.C. 552. In their opening brief on appeal, petitioners directly challenged the district court's ruling that the decision to terminate the ICP was a "legislative" or "substantive" rule. See Gov't C.A. Br. 27-36. That ruling, of course, constituted the sole basis for the district court's determination that petitioners had violated Section 552, which requires publication of "substantive rules of general

applicability." 5 U.S.C. 552(a)(1)(D); see Pet. App. 41a, 43a. Had the court of appeals agreed with petitioners that the termination decision was not a rule at all, it would have been required to reverse the district court's judgment, including the finding of a Section 552 violation. Since the district court's Section 552 ruling rests on the same erroneous premise that led both courts below to impose notice-and-comment procedures, Section 552 does not provide an independent ground for upholding the judgment below.

2. In defense of the decision below, respondents contend (Br. in Opp. 10-14) that the court of appeals properly ruled that statements made in congressional committee reports and hearings on lump-sum appropriations bills,[1] together with vague precatory statutory language and general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the APA. Not content to rely on the purported sources of law cited by the courts below, however, respondents point as well to the "IHS Manual and rules adopted regarding the ICP" in their attempt to avoid the conclusion that the reallocation of funds was "committed to agency discretion by law." 5 U.S.C. 701(a)(2); see Br. in Opp. 11. This attempt to bolster the decision below is without foundation.

a. We are unaware of, and respondents fail to cite, any "rules * * * regarding the ICP" that would provide law for a court to apply. The IHS Manual provisions relied on by respondents (see Br. in Opp. App. 10a-16a) do not mandate or even mention the ICP, nor do they provide standards for a court to apply in reviewing the agency's decision to terminate that pilot project. The applicable regulation

[1] Respondents misleadingly refer in their "Questions Presented" (Br. in Opp. i) to a "congressional mandate" to conduct the ICP. As the record demonstrates, the ICP was created at the discretion of the IHS, not at the command of Congress. Pet. 9-10; Pet. App. 11a. The "congressional mandate" to which respondents refer consists of nothing more than congressional hearing testimony and committee reports accompanying lump-sum appropriations for the IHS. *Id.* at 13a.

describing the IHS Manual, 42 C.F.R. 36.3 (1986), explains that it consists only of "operating procedures to assist officers and employees in carrying out their responsibilities." The regulation further explains that those procedures "are not regulations establishing program requirements which are binding upon members of the general public." *Ibid.*[2] Significantly—despite respondents' urging—neither court below held that the IHS Manual provisions provided "law to apply."

b. Respondents assert that congressional appropriations history may be referred to "for guidance in determining the proper rules for providing Indian health assistance." Br. in Opp. 13 (quoting *McNabb* v. *Bowen*, 829 F.2d 787, 793 n.6 (9th Cir. 1987)). Contrary to respondents' contentions, however, neither *McNabb* v. *Bowen* nor *Morton* v. *Ruiz*, 415 U.S. 199 (1974), holds that the legislative history of a lump-sum appropriations bill furnishes a basis for a court to review an agency's allocation of that lump sum among various programs. Moreover, respondents do not dispute that the court of appeals' reliance on legislative history of lump-sum appropriations for that purpose is in direct conflict with the decision of the District of Columbia Circuit in *International Union* v. *Donovan*, 746 F.2d 855, 861 (1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985). Indeed, respondents do not even cite *International Union*. That circuit conflict, however, warrants resolution by this Court.

c. Respondents also err in asserting (Br. in Opp. 11-12) that the Tenth Circuit's view of the federal trust responsibility is consistent with decisions of other circuits. As we explained in our petition (Pet. 11), the government acts as a fiduciary when it deals with Indian *property*. *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). The trust responsibility, however,

[2] Thus, this case plainly differs from *Morton* v. *Ruiz*, 415 U.S. 199, 234-235 (1974), in which this Court held that certain provisions of the Bureau of Indian Affairs' internal manual were intended to serve as binding regulations.

"do[es] not create property rights where none would otherwise exist." *Ibid.* Here, respondents cannot claim any property right in the ICP; Snyder Act funds are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United States*, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970).

The "trust" cases cited by the respondents (Br. in Opp. 11) are inapposite. The issue in both *McNabb* v. *Bowen*, *supra*, and *White* v. *Califano*, 581 F.2d 697 (8th Cir. 1978), was whether responsibility for providing health care to an indigent individual rested with the IHS or state health authorities. In both cases the courts held that it was the IHS's duty to provide health care to the individuals involved, based on the courts' determination that Congress intended the IHS to bear the primary responsibility for providing health care to indigent Indians. *White*, 581 F.2d at 698; *McNabb*, 829 F.2d at 793. Neither case holds that the federal "trust" responsibility imposes independent, judicially enforceable obligations on the federal government beyond those imposed by Congress itself.

Here, nothing in the Indian Health Care Improvements Act (IHCIA), 25 U.S.C. 1601 *et seq.*, or the Snyder Act, 25 U.S.C. 13, provides any basis for judicial scrutiny of the IHS's decision to terminate the ICP. Respondents rely (Br. in Opp. 12) on the "Congressional Findings" and "declaration of policy" that preface the substantive portions of the IHCIA, 25 U.S.C. 1601, 1602, contending that "Congress has admitted for the IHS that the 'trust' responsibility applies to the provision of health care." Respondents do not attempt to explain, however, how any "trust" obligation derived from those provisions could be applied by a court in a meaningful manner. The provisions cited by the respondents do not mandate spending on certain programs or contain specific spending requirements. Nor do they make any mention of benefits to be provided to handicapped Indian children in the Southwest; indeed, those provisions do not mention Indian children at all. Plainly, this "general statement of 'findings' * * * is too thin a reed to support * * * rights and

obligations read into it." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981).[5]

Likewise, the Snyder Act is without meaningful standards by which to judge BIA or IHS actions. "The general language of the Snyder Act does not delineate eligibility criteria or distribution guidelines for Indian health programs." *McNabb* v. *Bowen*, 829 F.2d at 790. Respondents assert (Br. in Opp. 12-13) that the Snyder Act provides law to apply because agency expenditures that were not undertaken for the relief of distress and conservation of Indian health would be unlawful, but they do not explain how the IHS action at issue here could be reviewed under that standard. The IHS terminated the ICP in order to utilize agency resources in a manner that would benefit Indian children nationwide rather than in the Southwest alone. That action was clearly intended to conserve Indian health.

In an effort to overcome the generality of the statutory text, respondents assert (Br. in Opp. 14) that the "laws must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA," because "[s]tatutes enacted to benefit Indians must be liberally construed in their favor." That canon of construction provides for a broad construction in determining whether Indian rights have been reserved or established, and a

[5]. Rather than providing "trust" law to apply, the provisions of the IHCIA quoted by the respondents illustrate a point we made in our petition. Pet. 13 n.7. In providing annual appropriations under the IHCIA and the Snyder Act and vesting broad discretion in the IHS and BIA to expend those appropriations for the benefit of Indians, Congress satisfied the moral obligations it found to be incumbent upon the federal government by virtue of the special relationship between the United States and Indian tribes. Since Congress declined to create vested rights in the particular programs or services provided under the auspices of the IHCIA and the Snyder Act — or to specify particular standards that must be followed by the IHS and BIA in allocating funds—the "special relationship" possesses no independent legal force in this context. It thus provides no basis for judicial review of discretionary agency decisions concerning the allocation of appropriated funds.

narrow construction when Indian rights are to be abrogated or limited. F. Cohen, *Cohen's Handbook of Federal Indian Law* 224-225 (1982). In the instant case, however, Indian rights are not at issue, and permitting judicial review is not necessarily favorable to Indians. In fact, the construction respondents urge would delay the provision of medical services to communities in need, because any change in services would likely result in a "hometown" challenge to the agency's decision. Thus, instead of benefiting Indian communities, respondents' position would lead to litigation among those communities over the allocation of finite IHS and BIA resources. In such cases, the canon of construction cited by respondents is of no assistance. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

3. a. Respondents contend (Br. in Opp. 7-10) that the courts below correctly held that the IHS's decision to terminate the ICP constituted a "rule" subject to the procedural requirements of the APA. In their view, all of the hallmarks of rulemaking are present in the decision terminating the ICP, because that decision had future effect on a particular group of persons and constituted a change in agency policy.

Respondents' arguments misapprehend the nature of rules and rulemaking. To be sure, the decision to terminate the ICP had a future effect, but that fact is hardly surprising, because "obviously *all* agency statements have future effect" in a sense. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring). What respondents ignore is that the IHS decision lacks the most significant attribute of a rule: It does not state for the future "what the law will be." *Id.* at 221. Specifically, the decision does not purport to set out future standards applicable either to the agency or to private parties.

Respondents mischaracterize the agency decision in contending (Br. in Opp. 8-9) that the IHS's termination of

the ICP changed "eligibility rules." Contrary to respondents' assertions (*id.* at 8), the IHS did not "establish[] rules determining who was eligible for ICP services." Rather, the ICP was a "regional * * * evaluation, treatment planning, consultation and training program" that would treat any "IHS * * * eligible child." App., *infra*, 1a (reproducing R. 14, Plaintiffs' Memorandum in Support of Motion for Class Certification, Exhibit B). The IHS decision to terminate the ICP did not change any individual's eligibility for IHS services or alter the general eligibility requirements published by the IHS. See 42 C.F.R. 36.12 (1986). Rather, it merely reallocated resources within the IHS. A change in services is not equivalent to a change in eligibility.[4]

b. In our petition (at 18) we demonstrated that under *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), agency decisions concerning the discretionary allocation of funds for the provision of services are not subject to the APA's procedural requirements that govern promulgation of legislative rules. Respondents contend (Br. in Opp. 9) that the instant case is different because it involves Indians "with whom the United States has a special relationship" and because the ICP was established pursuant to "congressional mandate and agency rules governing eligibility and program services." The record plainly shows, however, that the ICP was not created pursuant to congressional mandate, but was instead a discretionary pilot program established by IHS under a lump-sum appropriations act that made no mention of the ICP. Pet. App. 11a. Moreover, the creation and termination of the program did not affect any individual's eligibility for IHS services. And the "special relationship" between Indians and the federal government does not provide any independent basis for imposing rulemaking requirements, because it is not an independent source of

[4] Indeed, IHS regulations make plain that the services available to Indian communities will vary from time to time and place to place in the discretion of the IHS. See 42 C.F.R. 36.11(c) (1986).

specific legal constraints on the federal government in the absence of vested Indian property rights or entitlements. See Pet. 11-12, 20. Thus, respondents' attempts to distinguish *Overton Park*'s APA ruling are unavailing.

It is also clear that none of the other statutes relied on by respondents imposes notice-and-comment or publication procedures on petitioners under the circumstances of this case. As this Court made clear in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), courts may not burden agencies with administrative procedures that are not required by statute. Accordingly, the notice-and-comment requirement imposed by the court of appeals conflicts with *Vermont Yankee*, and warrants this Court's review.[5]

[5] Respondents speculate (Br. in Opp. 10) that imposition of rulemaking procedures on IHS health-care allocation decisions and other federal Indian programs "will not cause any undue restriction on the government's operation of * * * [such] programs" because the government has available to it the "good cause" exception to APA notice-and-comment rulemaking. See 5 U.S.C. 553(b)(3)(B). That argument is flawed, for several reasons. First, agency resource allocation decisions are not rules at all, and thus neither the APA's rulemaking requirements nor the exceptions thereto are applicable. Second, the "good cause" exception is applied narrowly, see *Action on Smoking and Health* v. *CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983), and were the IHS permitted to apply this exception to all of its health-care delivery and allocation decisions, the exception would quickly swallow the rule. Finally, it is not necessarily the case that application of this exception would save either time or expense in making allocation decisions, because the exception envisions that the agency will treat its decision as a rule for other administrative purposes. Such treatment, no less than the actual notice-and-comment period, will burden and delay services provided by the IHS and similar agencies.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

APPENDIX

The Indian Children's Program (ICP) is a jointly funded activity of the Office of Mental Health Programs of the Indian Health Service (OMHP/IHS) and the Office of Indian Educational Programs of the Bureau of Indian Affairs (OIEP/BIA). The ICP is predominantly a regional (BIA-IHS Albuquerque and Navajo Areas plus the Hopi Reservation) evaluation, treatment planning, consultation and training program but does carry out some national educational activities. This brochure is designed to help people in the regional referral area understand the functioning of the ICP, make appropriate referrals and know where to turn if problems with the Program arise.

I. *Who is eligible for services?*

The ICP will see any IHS or BIA/OIEP eligible child from birth through 21 years who either has, is suspected of having, or is at risk for having a physical, mental, emotional handicap or combination of handicaps. *Handicap* is defined as an inability to function in a normal fashion. Severity of handicap is not a consideration for eligibility. The majority of diagnostic categories seen by the Program are learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communications disordered, and the multiply-handicapped.

Under specific circumstances older individuals may be seen. Decisions to do such evaluations are made at the discretion of the ICP Director and are clearly the exception rather than the rule.

Any organization involved with Indian children, partially or totally, is eligible to receive education and training program services from ICP.

II. *What is the ICP service philosophy?*

The first priority of the ICP is the long-term treatment planning and follow-up of individual clients. It is more important to make certain that a treatment program is monitored periodically in a reliable fashion than it is to respond quickly to a new referral. Most of the children seen by ICP have chronic problems which require long-term involvement. In those rare instances when a true emergency exists, the Program will try to respond in a timely manner.

The ICP is meant to supplement existing local resources, not compete with them. ICP staff is available in a consultative capacity to local resources, either for second opinions or collaboration in difficult or confusing cases.